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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, *et al.*,

Petitioners,

v.

ALABAMA BY-PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Environmental Defense Fund hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case.

The Environmental Defense Fund (EDF) is a non-profit, public-benefit corporation organized under

the laws of the State of New York. Its nationwide membership of 35,000 includes scientists, educators, lawyers, and other citizens dedicated to the protection of our environment and the wise use of the nation's natural resources. Among EDF's primary objectives is "to effect a joining of the best scientific findings with the most appropriate social action discovered by the social sciences and legal theory in order [to] * * * best promote a quality environment" [Bylaws, Art. 1:2(d)]. EDF's "social action" includes education, research, and—when necessary "to prevent * * * degradation"—legal action, which is designed in part "to provide scientists fair and impartial forums in which their scientific findings may be presented objectively to their fellow citizens" [*id.*, Art. 1:2(f)].

In accordance with its objectives, EDF through its Scientific and Legal Advisory Committees evaluates and defines environmental issues, collects research data relating to those issues, and determines whether litigation is the appropriate course to follow. Its national membership and professional resources thus enable EDF to focus public attention upon environmental incursions that might otherwise go unrecognized. Its prosecution of many major environmental lawsuits[1] has established it as

[1] See, e.g., *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (DDT pesticides); *Environmental Defense Fund, Inc. v. United States Dep't. of Health, Educ. & Welfare*, 428 F.2d 1083 (D.C. Cir. 1970) (DDT tolerance levels); *Environmental Defense Fund, Inc. v. Ruckleshaus*, 439 F.2d 584 (D.C. Cir. 1971) (DDT pesticides); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971) (Gillham Dam); *Environmental Defense Fund, Inc. v. Montrose Chemical Corp.*, C.D. Cal., Civil No. 70-2389-ALS (complaint filed October 22, 1970) (DDT discharge in coastal waters); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 324 F. Supp. 878

one of the nation's most effective and responsible litigants in this important field.

EDF has a vital interest in the outcome of this case. Water pollution has been an important element in many of its pesticide and water resource cases and in some of those cases EDF has alleged violations, *inter alia*, of the Refuse Act, 33 U.S.C. Sec. 407. The Fifth Circuit's holding that citizens have no private cause of action under the Refuse Act casts substantial doubt on the ability of EDF to rely on that Act in the future in litigation in the federal courts where it considers such litigation necessary to abate water pollution. EDF has an organizational commitment to promoting the abatement of water pollution.

If the petition were to be granted and if EDF were permitted to intervene as an *amicus curiae*, it would file a brief on the issues discussed in the attached brief.

EDF is filing this motion at this time because an examination of the recently enacted (October 18, 1972)

(D.D.C. 1971) (cross-Florida barge canal); *Environmental Defense Fund, Inc. v. Hardin*, 325 F. Supp. 1401 (D.D.C. 1971) (Mirex); *Wilderness Society, Inc. v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970) (trans-Alaska pipeline); *Environmental Defense Fund, Inc. v. Resor*, D.D.C., Civil No. 2394-70 (order filed August 14, 1970) (nerve gas); *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*, 1 BNA Env. Rep. Cas. 1640 (D. Mont. 1970) (paper mill discharges); *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972), pending on appeal, 6th Cir., No. 72,138 (Tellico Dam); *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971) (Tennessee-Tombigbee Waterway). EDF has also filed petitions and/or been heard as a party in proceedings before numerous federal agencies, including the Atomic Energy Commission, the Environmental Protection Agency, the Federal Aviation Administration, the Federal Power Commission, the Federal Trade Commission, and the National Forest Service.

Federal Water Pollution Control Act Amendments of 1972 discloses that not only did that Act not repeal the Refuse Act, but has made clear its continuing force and significance, and thus the importance of the present case.

Petitioners and the Solicitor General of the United States have consented to the filing of this brief.[2]

WHEREFORE, it is requested that leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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[2]We expect that the written consents will have been filed with the Clerk by the time this brief is filed. We are in communication with counsel for the several respondents and will inform the Court as promptly as possible of their positions on our motion.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, *et al.*,

Petitioners,

v.

ALABAMA BY-PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Each of the respondents operates an industrial or manufacturing plant which has discharged refuse directly into streams which flow into navigable waters. Respondents had never applied for or obtained any permit from

the United States for such discharges. These discharges do not appear to have resulted in any substantial interference with navigation, but, by polluting and rendering toxic the streams and waters, they have resulted in injury to the rights of lower riparian landowners.

Petitioners, all lower riparian landowners, brought suit in federal district court to recover compensatory and punitive damages and to obtain appropriate injunctive relief, alleging the existence of a statutory wrong derived from the Refuse Act, 33 U.S.C. Sec. 407. The District Court dismissed the complaint for want of federal question jurisdiction, concluding that the protection of the Refuse Act did not extend to riparian landowners faced with "the kinds of water pollution that have traditionally been dealt with under the law of nuisance" (Pet. A-13).

On appeal, the Fifth Circuit affirmed "on the basis of the district court's well-reasoned opinion" (Pet. A-6). In affirming, that court expressly framed the central issue as whether "defendants' conduct constituted an interference with navigation" (*id.*).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Refuse Act has continued to be–since *United States v. Standard Oil*, 384 U.S. 224 (1966)–the basic vehicle for protecting water quality. It must be acknowledged, however, that enforcement activity on the part of the government has been less than satisfactory. The House Committee on Government Operations recently reported:

> The E.P.A. compilation [for the period December 3, 1970, to February 29, 1972] states that the Justice

> Department initiated the following number of cases, with assistance by E.P.A. regional offices: 26 civil, and 23 criminal.
>
> These statistics hardly represent a "vigorous" enforcement program, in view of the thousands of industrial dischargers throughout the country * * * .
>
> –*Eighteenth Report of the Committee on Government Operations: Enforcement of the Refuse Act of 1899* (August 9, 1972), p. 9.

Clearly, full enforcement of water quality legislation is dependent on those citizens directly involved, and on the availability of the federal remedy to protect their interests in water quality. Cf. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967).[1]

The cricual role of citizen suits in enforcing environmental legislation has repeatedly been recognized by the Council on Environmental Quality, as in their 1972 report:

> Citizen enforcement of NEPA [National Environmental Policy Act of 1969, 42 U.S.C. Secs. 4321 *et seq.*] through court action has been one of the main forces in making the Act's intended reforms a reality. * * * The events of the past year indicate that citizens lawsuits continue to provide a check on agency compliance with NEPA and to resolve important questions about its interpretation.
>
> –*Environmental Quality: Third Annual Report* (August 1972), p. 248.

The central role of the private citizen action has been given further recognition in the 1972 Water Pollution Control Act Amendments, discussed *infra*.

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[1] On the inadequacy of government enforcement procedures, see also D. Zwick, "Water Pollution" in Rathlesberger, ed., *Nixon and the Environment* (New York: Village Voice Books, 1972).

Given the vagaries of bureaucratic structure, internal policy formulation and resource limitation (all present in full bloom in the *Armco* case under the Refuse Act, for example[2]), it is clear that the consistent and thorough enforcement of environmental standards can only be obtained through the threat of *private* action at law; as the experience with NEPA discloses, the citizen suit is the backbone of environmental quality, and it is imperative that the corresponding right in the area of water quality legislation be recognized.

I.

THE HOLDING BELOW IS BASED ON AN INTERPRETATION OF THE REFUSE ACT WHICH CONFLICTS WITH DECISIONS OF THIS COURT AND OF SEVERAL CIRCUITS.

It is certainly true that much of the language of the Rivers and Harbors Act is expressly limited to matters of navigation. Nonetheless, only the second of the two offenses specified by the Refuse Act proper is limited "whereby navigation shall or may be impeded." The more general force of the first prohibition was recognized by the Ninth Circuit in *United States v. Alaska Southern Packing Co. (La Merced)*, 84 F.2d 444 (9th Cir. 1936), the Second Circuit in *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952), and, most recently, by the

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[2]*See Eighteenth Report of the Committee on Government Operations: Enforcement of the Refuse Act of 1899* (August 9, 1972), pp. 45 ff. See also *U.S. v. Armco Steel*, 333 F. Supp. 1073 (S.D. Tex. 1971), as modified ___ F. Supp. ___ [3 ERC 1263].

Third Circuit in *United States v. Esso S.O. of Puerto Rico*, 375 F.2d 621 (3rd Cir. 1967).[3]

Since there is nothing in the legislative history of the Refuse Act—or in the conceptual armaments of statutory wrong—which would support applying the "interference with navigation" (Pet. A-6) limitation imposed by the lower courts in this case *solely to private parties*, the Fifth Circuit, in "the only reported decision construing Sec. 407 to the contrary,"[4] has cast a disproportionate shadow over federal enforcement activities.

That shadow has not been dissipated by recent passage of the 1972 Water Pollution Control Act Amendments. It is the express intent of Congress that *pending* federal actions not be affected by the new legislation.[5] There are still a number of federal water quality suits under consideration in the lower courts for which *Guthrie* serves as unfortunate precedent.

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[3]Indeed, Sec. 407's provision for a permit program for deposits which did *not* impede navigation would make little sense if the Act applied only to discharges which *did* impede it.

It should be noted that the facts in *H. Christianson and Sons v. City of Duluth*, 154 F.2d 205 (8th Cir., 1946), which is often cited as denying a private right of action unconnected with navigation, presented an issue under the *second*, modified, prohibition and not the "general" clause.

[4]*United States v. Pennsylvania Industrial Chemical Co.*, 329 F. Supp. 1118, 1122 (W.D. Pa. 1971), rev'd, ___ F.2d ___ (3rd Cir., May 30, 1972) [4 ERC 1241]. It appears that the dubious honor must be shared with *Chambers-Liberty Counties Nav. Dist. v. Parker Brothers*, 263 F. Supp. 602 (S.D. Texas 1967).

[5]See Section 4(a) of the bill for the "saving clause," which is interpreted by Sen. Muskie and Rep. Wright in Cong. Rec. Oct. 4, 1972 at pp. S16883 and H9124 respectively.

Certainly, too, the issue raised directly by this case, that of the existence of a private right of action to remedy pollution, is itself an important issue of federal law. Indeed, given the logic of derivative statutory rights and the holding of this Court in *Standard Oil*, acceptance of such a right seems overdue. In recent months the Second Circuit has expressly chosen to leave the issue raised here open.[6]

Of course, the violation of a federal statute does not entitle everyone injured thereby to bring suit; the injury asserted must be "of the type the statute was intended to forestall." *Wyandotte Transportation*, 389 U.S. at 202. This, we take it, was the meaning of the lower court's statement here that (Pet. A-19):

> the injury of other private rights [than navigation or anchorage], even from deposits in violation of Section 407, does not give rise to a federal right of action * * *.

Any other interpretation would be plainly inconsistent with this Court's extension of federal rights of actions to all those within the protected sphere of interest. *Texas and Pacific Railway v. Rigsby*, 241 U.S. 33 (1916); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Wyandotte Transportation, supra.*

Two recent cases, *Chambers-Liberty Nav. District v. Parker Bros.*, 263 F. Supp. 602 (S.D. Tex. 1967) and *Lavigmino v. Porto-Mix Concrete*, 330 F. Supp. 323 (D.

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[6] In *Connecticut Action Now v. Roberts Plating Co.*, 457 F.2d 81, 90, n. 16 (2d Cir. 1972), the Second Circuit expressly left open the question whether "a private claimant specifically injured by a violation of Sec. 407—a riparian owner for instance—can sue for an injunction or damages * * *." Cf. *Hawkinson v. Blandin Paper*, 54 F.R.D. 517 (D. Minn. 1972).

Colo. 1971) illustrate the distinction. While both cases may have involved violations of the Refuse Act, *neither* plaintiff appears to have been asserting interests tied either to anchorage and navigation or to water quality.[7] The injuries alleged were not "of the type the statute was intended to forestall."

The proper issue is therefore not whether, arguendo, a violation of the Refuse Act has occurred, but whether the injuries suffered thereby are tied to an interest protected by that Act. To reach its holding, then, the court below had to conclude that the attempt to control water pollution was *not* an interest at stake in the enactment of the Refuse Act.

A review of the legislative history on this point is hardly necessary, since this Court has already faced this problem of interpretation in *United States v. Standard Oil*, 384 U.S. 224 (1966), in which the Court recognized two distinct inerests at stake in the enactment of the 1899 Act: protection of navigation and anchorage *and* protection of water quality. The injury to be remedied by the Refuse Act, concluded Mr. Justice Douglas, "was caused in part by obstacles that impeded navigation and in part by pollution." 384 U.S. at 229.

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[7]The injuries were thus not of the groups defined in *U.S. v. Standard Oil, infra*, as protected. There was, then, no necessity for these courts to contemplate the implications of *Standard Oil* for private actions.

II.

PASSAGE OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 ACCENTUATES THE IMPORTANCE OF DERIVATIVE PRIVATE ACTIONS FOR VIOLATION OF INTERESTS PROTECTED BY THE REFUSE ACT.

A. The New Act Does Not Repeal the Refuse Act or Vitiate Its Force As Environmental Legislation

The Water Pollution Control Act Amendments of 1972 (hereinafter the 1972 Act) forms a comprehensive water quality statute which, *inter alia*, creates a permit program intended to operate in harness with the Refuse Act. Section 402(a) provides for an orderly transition from the present permit program handled by the Corps of Engineers to one supervised by a special administrator. The Secretary of the Army retains all his other authority under the Rivers and Harbors Act by virtue of Sec. 511(a). The continuing force of the Refuse Act is implicit in the language of Section 402(k):

> Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act. or (2) section 13 of the Act of March 3, 1899, unless * * * .

Thus, the new Act operates not to repeal the Refuse Act but to buttress it by creating an efficient and explicit permit program. This interpretation is supported by the remarks of Rep. Jim Wright, one of the conference managers of the bill:

> I cannot say that the Refuse Act has been a failure, but I can say that there are infirmities in the

program itself and infirmities created by the Kalur and PICCO decisions which have minimized the effectiveness of the Refuse Act.

The Committee on Public Works in the House of Representatives and the Committee on Public Works in the other body recognized the infirmities, existing and potential, and established a new permit program. [Cong. Rec. Oct. 4, 1972, p. H9128.]

As Senator Griffin put it on the same day in "the other body" (p. S16882):

* * * it is inconceivable that the Senate would want to emasculate the best available enforcement device now available (sic)—the Refuse Act.

Any argument that Congress intended to keep the Refuse Act solely as a navigational statute is inconsistent with Sec. 402(k), quoted *supra*, which implicitly recognizes that discharges which do not meet its exculpatory terms may constitute violations of the Refuse Act. On this point we also have the explicit statement of Rep. John Dingell, further barring such an argument:

* * * the bill does not repeal the Refuse Act of 1899. It still remains available to prevent the discharge of polluting wastes. (p. H9126)

B. The Purpose of Section 505 of the 1972 Act Was to Encourage Private Actions of All Kinds to Insure Enforcement of Water Quality Standards.

By the terms of Section 505(a), "any citizen" may bring an action against an alleged violator or against the Administrator to "enforce such an effluent standard or limitation" as defined in the Act, subject to various restrictions. In Section 505(e), however, Congress makes

it clear that the codification of this particular remedy is not meant to discourage or prohibit action on any other tack:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statutue or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Thus the effect of Section 505 is threefold: it *recognizes* the crucial role of action by private citizens in enforcing water quality legislation; it *codifies* a particular approach to such citizen enforcement; it *leaves open* all other avenues to litigation aimed at compliance with the law.

C. Citizen Actions Under the Refuse Act Must Play a Key Role in Future Enforcement of Water Quality Standards.

Certainly one of the most important factors in the speedy development and application of water quality standards under the 1972 Act will be the rate at which permits are sought. As noted above, Sec. 402(k) of the new legislation provides that, until December 31, 1974, dischargers are immune from actions based on either the 1972 Act or the Refuse Act if their bona fide applications for permits are still under consideration. Conversely, it remains an offense under both Section 301(a) of the 1972 Act and under the Refuse Act to discharge effluents without applying for a permit—or to do so after a permit has been refused.

Section 505(f) of the 1972 Act provides further that no citizen action based on Sec. 505 can be commenced

for violation of Sec. 301(a) before July 1, 1973. Thus, until that time, *private* litigation based on the 1972 Act cannot be utilized by citizens who, adversely affected by illegal discharges, and wishing to insure that the 1972 Act will be fully complied with, look to the courts to pressure recalcitrant businesses into filing for permits. If, however, the discharge constitutes pollution within the meaning of *Standard Oil*, an injured citizen might bring suit under the Refuse Act at any time. The 1972 Act does not bar such a suit, an excellent policy decision since those whose discharges involve pollution have long been on notice that a permit is required. They should have no additional grace period under the Refuse Act of 1899.

Perhaps the most important facet of this entire issue is that while damage suits under the 1972 Act were not expressly authorized, in Section 505(e) Congress reserved whatever causes of action that might arise under any other statute—including, therefore, damage actions under the Refuse Act. While the threat of a civil fine may act as a deterrent of sorts in controlling water quality, it is an inefficient means of defining and distributing the social costs of pollution, particularly when compared to aggregated damage claims, such as in the present case. From such a perspective, the availability of damage actions for violation of water quality standards is an essential element in enforcing those standards and defending the rights protected by these statutes.

Given the flexibility and greater range of actions based on the Refuse Act, passage of the 1972 Act serves to accentuate the important federal questions raised by the decision of the Fifth Circuit. In view of past history it seems hardly an exaggeration to conclude that the effectiveness of the new standards—and the restoration of water quality to this nation—is of a piece with the effectiveness of action by private citizens and citizen groups. The availability of a full range of remedies for

protected parties, both private and governmental, is essential for the preservation and renewal of our once sparkling treasures.

III.

THE DISTINCTION MADE BETWEEN THE RIGHTS OF RIPARIAN LANDOWNERS AND THOSE OF OTHER CLASSES AFFECTED BY VIOLATION OF THE REFUSE ACT APPEARS TO BRING THE FIFTH CIRCUIT INTO CONFLICT WITH THIS COURT AND WITH THE SECOND CIRCUIT.

A distinction between the rights of riparian landowners and those of other classes affected by the Act is without basis in the legislative history of the Act or in its previous judicial interpretation. If that distinction is based on the availability of an alternate remedy in state court, then it is in conflict with several decisions by this Court.

This Court expressly rejected the theory that the mere presence of an alternative theory of action arguable at the state level dispels a claim to a *federal* right in *Bell v. Hood*, 327 U.S. 678, 681 (1946):

> Before deciding there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the laws of the United States. For to that extent the party who brings suit is master to decide what law he will rely upon * * *.

The question was squarely confronted again in the context of *Monroe v. Pape*, 365 U.S. 167, 183 (1961), and this Court concluded that:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused * * *.

The Fifth Circuit has applied this rule in the civil rights case of *Burnett v. Short*, 441 F.2d 405 (5th Cir. 1971), but the distinction raised in the instant case suggests a contrary rule, one forcefully rejected by the Second Circuit in *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2nd Cir., 1956):

> Although a right created by a federal statute covers the same ground as a right already existing under the common law of the states and territories, a suit based on that federal statute is one 'arising under' a law of the United States * * * .

CONCLUSION

The decision of the Fifth Circuit in *Guthrie v. Alabama By-Products* conflicts with decisions of this Court and with decisions in other circuits on several grounds. The decision raises questions of continuing legal and practical importance which should be reviewed by this Court.

Respectfully submitted,

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We wish to acknolwedge the substantial assistance of James A. Beha, Harvard Law School, in the preparation of this brief.